APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1968

No. 35

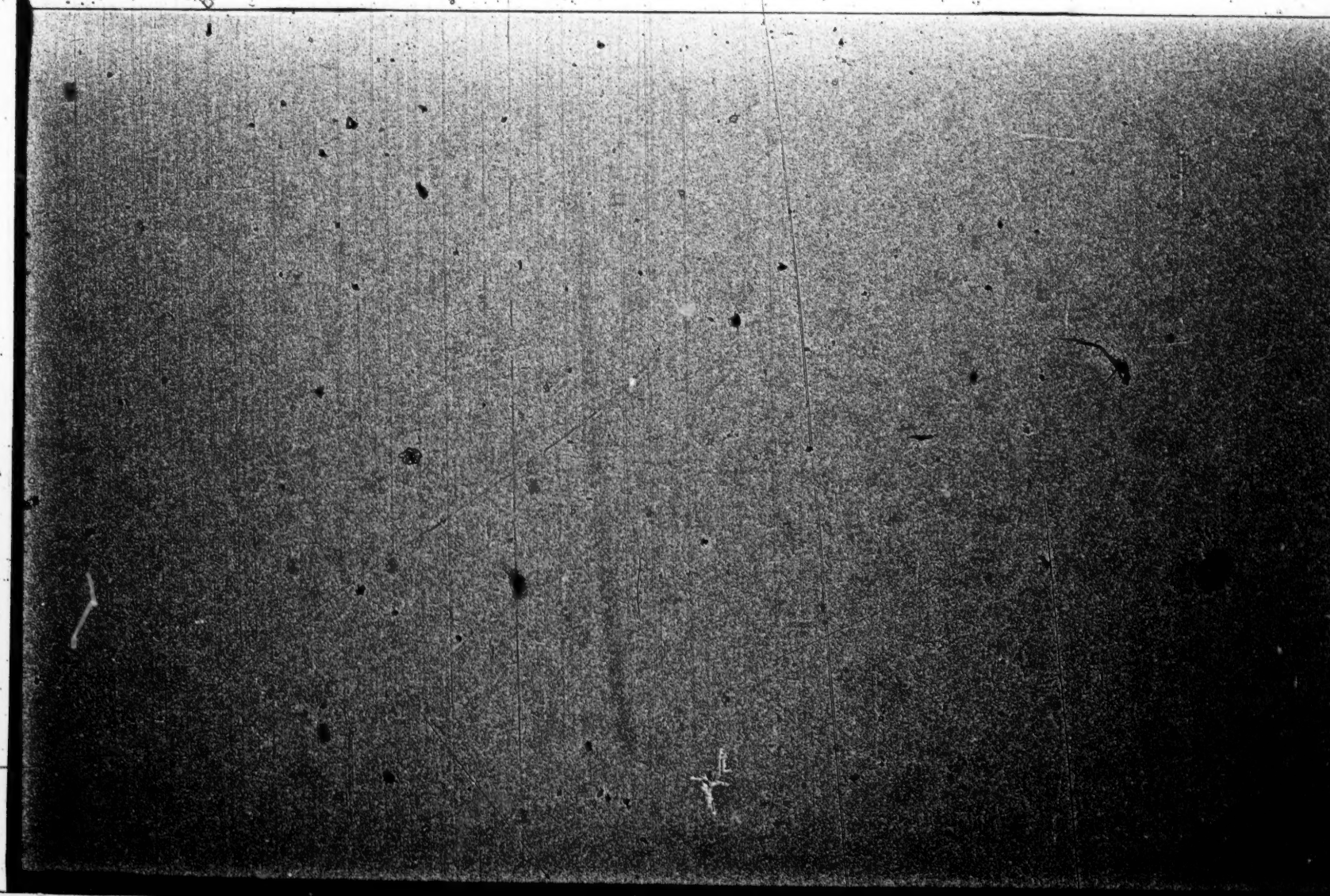
CARL F. GRUNENTHAL,
Petitioner,

v.

THE LONG ISLAND RAIL ROAD COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 28, 1968
CERTIORARI GRANTED MAY 6, 1968



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Relevant Docket Entries

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

7-10-67 Filed record (original papers of District Court)

11-8-67 Argument heard (by: Lumbard, ChJ., Medina & Hays, CJJ)

1-11-68 Judgment Affirmed in Part and Action Remanded, Medina, CJ

1-11-68 Dissenting in part in separate opinion, Hays, CJ

1-11-68 Filed judgment

1-16-68 Filed order removing original record

1-24-68 Filed motion to stay issuance of mandate

2-1-68 Filed order granting motion to stay issuance of mandate

2-21-68 Certified original record and proceedings for Meyer, Lasch, Hankin & Poul, Esqs.

2-27-68 Filed receipt by Supreme Court of original record

2-29-68 Filed certificate of filing of petition for writ of certiorari

3-1-68 Filed notice of filing of petition for writ of certiorari

5-9-68 Filed certified copy of order of Supreme Court granting petition for writ of certiorari

Relevant Docket Entries

DISTRICT COURT

Nov. 29-63 Filed complaint and issued summons.

Dec. 26-63 Filed deft's Answer.

Feb. 21-67 Before Cooper, J Jury—trial begun.

Mar. 2-67 Trial concluded—Verdict for pltff on liability 2-28-67—Verdict of $305,000 for pltf 3-2-67.

Apr. 10-67 Filed memorandum Opinion #33408—each motion addressed to the alleged excessiveness of their verdict is denied—jury's verdict remains undisturbed —let judgment be entered—So Ordered—Cooper, J M/N.

Apr. 13-67 Filed order & Judgment #68,576 that pltff have judgment against deft LIRR in amt of $305,000 —Cooper, J judgment entered 4-13-67 Clerk M/N ENT 4-14-67.

May 8-67 Filed deft's notice of appeal—Mailed copy to Irving Younger, — Meyer, Lasch H & P MacIntyre, Burke &s & C.

June 21-67 Filed deft's notice of appeal—Mailed copy to Irving Younger, MacIntyre, Burke, Smith & C & Meyer, Lasch, Hankin & P.

EXCERPTS FROM TRANSCRIPT

(4) * * * The Court: Let the record show that from the very outset off the record we had a discussion with respect to trying the issue of liability first, and then going into the other stage of the case depending on what the jury did with the issue of liability.

* * * * *

(5) * * * Accordingly, unless there is some violent objection, I think we should go first to the issue of liability alone and then upon the verdict based on that issue proceed further.

* * * * *

(442) * * * The Clerk: Mr. Foreman, have you agreed upon a verdict?

The Foreman: We have agreed upon a verdict. * * *

The Foreman: In announcing its verdict on the issue of liability, the jury responds to the following questions:

Was the railroad negligent on September 19, 1962?
Yes.

If so, did such negligence contribute in (443) any degree to the plaintiff's injuries?
Yes.

Was the plaintiff contributorily negligent? No.

Motion to Set Aside Verdict

* * * * *

The Court: Motions Mr. Gallagher and Mr. Gallagher and Mr. Cohalan.

Mr. Gallagher: Your Honor, in view of the fact that we are going to continue and the rule provides we can make the motions in writing, I thought perhaps that under the circumstances—

(444) The Court: Why don't you do it both ways? Do it now.

Mr. Gallagher: Right.

I now move to set aside the verdict on the grounds it is contrary to law and contrary to the weight of the evidence. I also move for a directed judgment for defendant notwithstanding the verdict.

Mr. Cohalan: I move to set aside the verdict in favor of the plaintiff on the grounds it is against the evidence, the weight of the evidence, and contrary to law.

The Court: Each motion is denied.

* * * * *

(447) * * * HAROLD HERBERT COHEN, called as a witness by the plaintiff, being first duly sworn, testified as follows:

* * * * *

Direct Examination by Mr. Meyer:

Q. Doctor, you are a practicing physician in the City of New York, are you not? A. Yes, sir.

Q. You are a graduate of what institution in what year? A. McGill University in 1932.

Q. And have you specialized in any branch of medicine? A. Yes, sir.

Q. And what is that? A. Orthopedic and traumatic surgery.

Q. And with what type of medicine does that specialty treat? A. That concerns itself with diseases and injuries of bones and joints, the skeleton, namely.

(449) Q. For how long have you practiced in that specialty? A. For 32 years.

Q. Have you been certified by any medical board in that specialty? A. Yes, sir.

Q. And which board is that? A. The specialty board that deals with orthopedics called the American Academy of Orthopedic Surgeons in 1941.

Q. And your office is where? A. At 700 Park Avenue.

Q. Now, Doctor, you have seen and examined Carl F. Grunenthal, the plaintiff in this case, have you not? A. Yes, sir.

Q. You have not been called upon to treat him? A. That is correct.

Q. You examined him solely at the request of my office in order to obtain an independent opinion as to his condition and as to his progress, is that correct? A. Yes, sir.

Q. Now, when was it that we first requested (450) you to examine Mr. Grunenthal? A. March 13th, 1964.

Q. And at that time did you receive a history of what his problem was? A. Yes, sir.

Q. And his problem was confined to what portion of his body? A. To the right foot and limb.

* * * * * *

The Court: Doctor, have you examined—will you show it to the doctor at this juncture? Have you examined the exhibits for identification just referred to by counsel?

The Witness: No, sir.

(451) The Court: All right. Will you take a look at them, Doctor?

(460) * * * *Direct Examination by Mr. Meyer (Continued):*

Q. Now, Dr. Cohen, briefly from the records of the hospital will you be good enough to tell the Court and jury what had happened to Mr. Grunenthal from the time of his accident up to the time that you saw him in March of 1964.

* * * * * * *

(461) The Court: 2 for identification becomes 2 in evidence; 3 for identification becomes 3 in evidence; 4 for identification becomes 4 in evidence; 5 for identification becomes 5 in evidence; and 6 for identification becomes 6 in evidence.

(Plaintiff's Exhibits 2, 3, 4, 5 and 6 for identification received in evidence.)

* * * * *

A. He was first admitted to the Queens General Hospital on 9/19/62 with a severely crushed right foot resulting from an accident of a piece of lumber falling on his foot.

The history states, "While working he was loading railroad tires when one slipped and injured his foot."

The Court: Ties?

The Witness: It says "tires." It should be ties.

A. (Continuing) The report of the original findings are skimpy on this second ID which I am (462) holding in my hand.

The Court: You mean 2 in evidence?

The Witness: 2 in evidence, yes, sir.

A. (Continuing) But from a perusal of the later findings, I can state that he suffered a compound fracture. In other words, the skin was broken on the instep of the foot, the wound penetrated to the sole of the foot, the bones of the great toe joint were crushed and shattered, the joint—the ball of the joint of the great toe was injured, the metatarsal, which is the bone in front or what we call proximal to the ball of the joint was also injured. The second metatarsal, and I am indicating using my right hand as my foot, the second metatarsal was likewise fractured.

Later on—well, I won't go into that.

And so he had a pretty badly crushed foot.

The Court: That is what is revealed by the hospital records in evidence?

The Witness: Yes, sir.

The Court: All right.

A. (Continuing) Treatment consisted of application of a cast and although this report does not (463) indicate it, the foot must have been cleansed and cleaned to the best of the surgeon's ability, all loose pieces of bone were removed and as much replaced as was feasible was carried out.

Antibiotics were given to control the possibility of infection and then a leg cast was applied to the right limb.

That is the first admission from 9/19/62 to 9/26/62.

Among the antibiotics given were cormacedin, penicillin and so on.

The second admission was to the Brunswick General Hospital and there the admission date is 9/26/62. He was discharged on 10/10/62 and—

Q. That shows, Doctor, does it not, that he was transferred from Queens to Brunswick? A. To Brunswick, yes, sir.

Q. All right. A. At that hospital the diagnosis is essentially what I have indicated and what they did there was to remove the short leg cast. That gave him an opportunity to re-examine the foot and they cleansed it again and again put on another cast in an effort to obtain healing. (464) That was the first admission to the Brunswick Hospital.

Then the patient was next admitted on February 1, 1963 and was discharged on February 23, 1963. Again the diagnosis is the same, except that this time he had developed an infection and was admitted for infection of the wound and this was treated by means of foot soaks and antibiotics and finally he was discharged again with a cast on his foot. That was from February 1, 1963 to the 23rd.

The next admission was from December 10, 1963 to December 17th.

Q. I think you have one out of order there, Doctor. You have August? A. This is February, no—

The Court: Go on, you are looking at 5 in evidence.

The Witness: At 5, yes.

A. (Continuing) December 10, 1963 to December 17, 1963 and this time he was admitted because of impending gangrene to the foot. There had been a deterioration in the circulation of the foot during these months and there is a description here of deep red discoloration across the instep with an (465) ulcer over the foot and the impression—

The Court: A little louder, Doctor.

A. (Continuing) And the impression here of the doctor who subsequently operated on him was that of a post-injury vasal spasm which means a contraction of the blood vessels about the foot with ulceration, with an ulcer of the foot.

The Court: Would you explain that, Doctor? We have a general notion of what an ulcer means, but what is an ulcer of the foot?

The Witness: An ulcer of the foot is where there is actually a loss of skin and tissue beneath the skin. The bed is—the bed of the ulcer, that is, the part which you look down on, is unhealthy in appearance. It had a yellow—what is it called?—necrotic or a death-like appearance of tissues instead of being nice and bloody. There is no blood around the area so it is considered necrotic.

The Court: Is that what the report indicates?

The Witness: Yes, sir.

The Court: Was that the compelling cause for the operation?

The Witness: Yes. The vasal spasm, the (466) foot was about to die, they described it as impending gangrene and in order to improve the circulation which had suddenly —not suddenly, over the months had gradually been deteriorating, this other operation was done which Dr. Urb did and called it a right sympathectomy.

Now, that is—

The Court: What is that, now?

The Witness: That is an operation where an incision is made on the abdomen. All the abdominal structures are pushed aside and one works his way down to the spinal column. Now, along the spine there are two chains of nerves called sympathetic ganglia. They are little bead-like chains of nerves connected by little beads and these little beads send off tiny little filaments to the blood vessels of the limbs, one on each side and they control the amount of opening or closing of the blood vessels in your legs and, therefore,

indirectly the amount of nourishment which the tissues of your limbs should get.

Now, in injuries there is a condition called a vasospasm where because of poor nourishment to the tissues by the original accident or because of pain these tiny little blood vessels clamp down and (467) so blood cannot pass to the limb and gangrene is threatened.

The purpose of this sympathectomy is to remove these controls which maintain the closing down of the blood vessels.

Now, once that control of the sympathetic chain is removed, then the blood vessels open, because there is no more regulatory influence sent down from the spinal column to control the amount of opening or closing of the vessels.

The Court: Doctor, I am going to take over. It is not my function, but see if what I am about to state is in essence what you have been telling us.

As I gather it, the blood vessels carry blood to various areas of the entire body, carry food and oxygen to the tissues. Right?

The Witness: Yes, sir.

The Court: When the foot in this instance demonstrated a lack of nourishment, a lack of oxygen which the doctors indicated was producing this gangrenous condition, it was decided to perform an operation whereby the amount of blood going to the foot would be larger than what was going up to that time?

(468) The Witness: That's correct.

The Court: That is in simple language?

The Witness: Yes, sir.

The Court: This sympathetic system controls the area of the blood vessel and when controlling it the blood vessel opening shrinks then the amount of blood that goes in there, goes through, is diminished severely, is that right?

The Witness: That is correct, sir.

The Court: So what they were endeavoring to do was to release the sympathetic controls on the blood vessels to

the foot to the end that more blood would be going through the blood vessels and in that way the foot would get more nourishment and more oxygen?

The Witness: That is correct, sir.

The Court: Do I get a passing mark on that?

The Witness: Yes, excellent. You get an excellent. And that was the purpose of the operation. He was in the hospital for that from December 10th to December 17th, 1963.

Q. Now, may I interrupt you just a moment, Doctor, and this is because of an oversight on your (469) part.

Mr. Meyer: There was an in-between hospitalization which I will have marked for identification as P-7. I don't think it will add much but just for the sake of completeness, we will just refer to it.

(Plaintiff's Exhibit 7 marked for identification.)

Mr. Gallagher: I have no objection to it going into evidence.

The Court: Mr. Meyer, gentlemen, I want to talk to the marshal.

(Plaintiff's Exhibit 7 for identification received in evidence.)

(Pause.)

The Court: One more question and then I will remain quiet.

What do the reports show was the outcome of that sympathectomy? Does it show?

The Witness: It was too early, sir. He was only there a week.

The Court: All right. Go ahead, Mr. Meyer.

Q. Go back the next two months to the immediate (470) hospitalization in August of 1963 which is Plaintiff's Exhibit 7. A. Oh, yes, this is another admission to the Brunswick Hospital from August—looks like August

30th, 1963 to September 21st, and here skin grafts were done in an effort to replace skin which had been lost and resulted in formation of ulcers on the instep of the foot.

The Court: Where did they take the skin from?

The Witness: I know it was taken from the right upper thigh.

The Court: How do you know that?

The Witness: From having examined the patient, but it may now show it here, too, sir. I will just look at it.

The Court: All right, next question.

Q. Doctor, that was for the same condition, wasn't it? A. Yes, the operative record shows.

Q. And that was the same—

The Court: What does the operative record show?

The Witness: Full skin graft taken from (471) the anterolateral surface of the right thigh.

The Court: Does that disclose the area?

The Witness: Yes.

The Court: What area?

The Witness: That is the upper—

The Court: No, the actual skin, how much skin?

The Witness: Oh, yes, three by four centimeters.

The Court: Thank you, sir.

The Witness: That is about a little over an inch by an inch and a half of skin.

The Court: Yes, sir.

The Witness: The next—the last hospital admission—

The Court: Would you mind reading the number, Doctor.

The Witness: Then came the sympathectomy and then the next admission was from June 10, 1964 to June 16, 1964.

The Court: And that you get from Exhibit 5?

The Witness: This is Exhibit 6.

The Court: 6 I mean, yes.

Q. Doctor, before that date, you had personally (472) examined Mr. Grunenthal, is that correct? A. Yes, sir.

Q. Now, before then, going to Plaintiff's Exhibit 6, will you be good enough to tell us what your personal observations of him were when you saw him? A. Yes, sir. He was disrobed and first a visual inspection was carried out of his foot and then he was asked to walk and so on. He stood with the great toe very badly deformed, the foot was discolored, had a brown discoloration, the skin was thinned out and shiny in appearance and it was all in all a pretty unhealthy looking foot.

The ball of the great toe did not touch the floor at all. The toe was shortened and in the cocked-up or what we call a hammer position the adjoining second and third toes were likewise hammered; instead of lying flat they were in the hammer position.

He walked with a limp. There was scarring present over the foot. The foot was cold, it was not as warm as the opposite limb. He had the scar of the sympathectomy on his right lower abdomen.

Motions were very bad as far as the great toe joint was concerned. Actually, there was no (473) motion there at all. Neither the ball of the great toe joint, nor the terminal portion of the great toe joint showed any movement at all either on the part of the patient or when I attempted to move it.

There was swelling present at the base of the lesser toes. The movement of the other toes were poor. All he had was this type of a movement, indicating with my right hand. He did not have the normal grasping movement of the lesser toes.

Even the ankle showed some impairment in movement in one of the directions.

One of the main blood vessels to the foot did not show any blood passing through it compared to the opposite foot. We call that the dorsalis pedis vessel.

Mr. Gallagher: I didn't hear what that was described as, your Honor.

The Witness: The dorsalis pedis vessel.

The Court: The blood vessel.

The Witness: That is a blood vessel, sir, which runs over the instep.

There was numbness in the region of the great toe joint to pin prick.

The Court: What does that mean?

(474) The Witness: Well, when a pin was passed over the skin of the great toe, he did not have the same perception of feeling that he normally should have.

Q. What's the significance of that, Doctor? A. It indicates that the nourishment has been very bad and in all likelihood the nerve supplies have been injured. There were no other ulcers to the foot. Whatever ulcers he had had healed. I think that was the major finding.

The Court: What date was this, Doctor—

The Witness: That was March—

The Court: —that you examined him?

The Witness: That was March 13, 1964.

The Court: March 13th, 1964. All right.

Q. Now, so as not to hold you in court any longer than necessary, Doctor, let's go on from there and then get your opinion of his situation all at once.

There was a later hospitalization after you saw him at that time, is that right? A. Yes. May I go back just one step before I get to this?

Over the ball of the great toe there was a (475) quite bony prominence present which was quite painful to touch and it appeared as if it was getting ready to puncture the overlying skin. I forgot to mention that finding.

The Court: Doctor, may I just ask you, that finding, was that a softness?

The Witness: No, that was—

The Court: Hard?

The Witness: Bony, hard as if a piece of bone was trying to—

The Court: Get out?

The Witness: —get out.

The Court: All right.

The Witness: This last admission was from June 10, 1964 to June 16, 1964 at Brunswick Hospital and the purpose of this admission was to remove that piece of bone which I have just described. That was done.

Q. And that was operated on at that time? A. Yes, sir.

Q. Now, Doctor, let's go on to your examination again so that you will be able to tell us about his present condition: Yesterday I asked you to look at him again for that very purpose, didn't I? (476) A. Yes, sir.

Q. And did you make a complete examination of him and X-rayed his foot? A. Yes.

Q. And see what his present condition is? A. I did, sir.

Q. All right. Now, tell the jury and the Court, if you will, in what respect the condition of his foot has changed in any way, what its present condition is? A. Yes. The most startling change was that the right foot had now become warmer than previously noted. In other words, the sympathectomy now was functioning properly.

The Court: I'm sorry to interrupt you, but in effect that is the same as saying there was an increase of blood circulation in the foot?

The Witness: Yes, there was an increase of blood in the foot. It does not mean, of course, that the deep structures of the foot are getting the blood, but certainly the skin temperature is now warmer.

The Court: Yes, sir.

The Witness: That is all that a sympathectomy (477) does. It improves the warmth of the skin.

The Court: Yes, sir.

The Witness: The major portion—the rest of the examination was very much the same, except he now had a scar over the ball of the great toe where this mass of bone had been removed. He still walked with a limp. The appear-

ance of the foot was still very, very much the same; the skin was shiny and had a brownish discoloration. The shoe was worn in such a manner that it was obvious he was bearing most of his weight on the outerside of his foot. There was no wearing out of the shoe on the inner side compared to the left foot. The movements were bad. Both the—all the movements of the forefoot were bad and all—he had thinning of his calf to the extent of one inch. He had some thinning of his thigh musculature indicating that the weight was not being properly distributed on the limb, he was not carrying the same degree of weight and stresses on that limb. The X-ray showed that there was still demineralization of the bones of the ankle and foot.

The Court: What does that mean?

The Witness: Well, demineralization means (478) where there is a loss of salts in bony structures following an injury and if weight is not being property distributed on the limb, nature simply does not redeposit those salts again. They are just lost.

The Court: Does that in turn go back to a decrease in circulation? Does the circulation carry those ingredients as well?

The Witness: Oh, yes, yes, sir. The circulation is responsible for all that, yes, sir.

The Court: All right.

The Witness: I took X-rays of his foot and it demonstrated rather a severe injury to the inner part of his foot. The ball of the great toe was completely destroyed. There was no joint there at all. The last joint of the great toe was absent. There were pieces of bone scattered where they didn't belong. There was spreading of the bone fragments, and so on.

Q. Would it assist us, Doctor, if you were to show us the most recent X-rays as to what the present condition of the bones of the foot are? A. Yes, I think it might be of some help.

Q. Well, may we have that now?

The Court: Are you offering those in evidence?

(479) Mr. Meyer: I better have it marked, your Honor. I will offer two plates. I will ask the clerk to mark it.

The Court: These were taken yesterday?

The Witness: Yes, sir.

Mr. Meyer: Plaintiff's Exhibits 8 and 9.

The Court: Any objection, two X-rays taken yesterday, Mr. Cohalan?

Mr. Cohalan: No, sir.

Mr. Gallagher: No, sir.

The Court: Received.

(Plaintiff's Exhibits 8 and 9 received in evidence.)

* * * * *

(480) * * * The Court: Very well. Please continue. I'm so glad you are better accommodated. That is 8 in evidence.

The Witness: 8 in evidence. This is a picture of the patient's foot. The foot rests on the plate and the central ray comes down and gives this impression—I'm sorry, this impression. This view, the film on my left, is taken by the foot rolling over to the side a little bit this way, whereas this view here the foot is down flat on the plate.

These are—a foot has five metatarsals. This is the one adjoining the pinkie, so this will be called five, four, three, two, one. This is the great toe metatarsal.

(481) Now, what has happened here, it is difficult to reconstruct actually because this is just a mess of bone. This should in reality look very much like this one here except that it is a little bit shorter. This is the second metatarsal. The first metatarsal should look like this second metatarsal.

The Court: Can you all see?

Juror No. 7: I—

The Court: Won't you, if you don't mind—could you give the juror an extra seat? Oh, won't you move down?

Would you mind using a ruler?

May I interrupt. Show us a normal toe bone structure.

The Witness: This would be a comparatively normal bone structure. This is the second metatarsal. The first metatarsal should look like this, it should have a bulbous end called the metatarsal head. It should have a joint indicated by this line, then it articulates with a smaller bone called a phalanx.

Now, this is missing here. The great toe has two phalanges, whereas the lesser toes have three. There is the —well, this is not too clearly (482) demonstrated. Here perhaps, you see one here, one here and one here. Now, the great toe has two, one large one articulates with the metatarsal head and then a smaller one articulates with the proximal phalanx.

Now, the lesser bone corresponding to this bone here has been crushed and spread apart like a V. It's just been opened up. And you can see the big gaping hole in between here. The metatarsal head itself of this first metatarsal has been completely crushed and pushed over to a side. Look at this piece of bone lying right here. So that the joint is completely lost; there is no joint here at all. You notice there is a joint here and a joint here and here. Well, here there is no joint at all.

And the last joint has become stiffened. There is no joint surface here or here at all.

This little white line demonstrates the fracture of the second metatarsal, which Nature has healed. If you look closely you can see a little white line running through the center, whereas the one you can see the narrow is very evident by the black streak right through the center.

(483) These bones themselves, all these metatarsals are markedly thinned out. They should be of wider consistency. A normal foot would show one, perhaps one and a half times its width, and that we call an atrophy due to lack of weight bearing. The calcium material, the salt material simply is dissipated and shrinks away.

Now, this is the side view which I indicated of the same foot and once more you can see that this joint is completely disorganized. The bone, the proximal phalanx which articulates with the metatarsal has been fractured and spread apart and a piece of it has united to the metatarsal joint so that there is no joint there any longer.

Notice, the overall black appearance of the bone which indicates decalcification or demineralization.

Q. Does Plaintiff's Exhibit No. 9 add anything to that, Doctor? A. Not especially, sir.

Q. Then I don't want to take your time to go into it.

* * * * *

(484) * * * Q. Now, Doctor, from the X-rays you have given us a picture of the underlying condition of this man's foot.

Now, would you tell the Court and the jury what the appearance of the foot is and what you make of that? A. Yes, the entire foot is badly nourished. We are just looking at the bones. You don't see the ligaments or the blood vessels or the nerves in an X-ray of the bony structure.

(485) I think that the appearance of the foot speaks for itself, if we could get the patient here.

Mr. Meyer: With your Honor's permission I will ask Mr. Grunenthal to come up.

Mr. Gallagher: Your Honor, I am going to object to that.

The Court: Objection sustained.

Q. Well, suppose you describe it as best you can then, Doctor. A. I will try. There is a substance lost, soft tissue substance lost of the ball of the great toe. The ball of the great toe and the metatarsal is raised above the ground so that no weight falls on that part of the foot at all. It is fixed, it sticks up like a sore thumb, like a sore great toe. The skin is discolored. It has a brownish discoloration. It is shiny and atrophic in appearance.

Q. What does that mean? A. Which means that the nourishment to the foot is so bad that the skin shows the

unhealthy condition of the foot. The movement of all the toes is very bad, (486) it is poor; and all in all he's got a poor functioning foot.

The Court: I had to, as I understand the law, sustain the objection, but that does not prevent you from demonstrating with your hand again what you wish to understand with respect to the foot, in particular the fleshy portion of the foot.

Now, demonstrate that with your hand, using the flesh of your hand, if you wish.

The Witness: Well, the skin of the foot, for instance, hasn't got the normal hair on it that a foot normally has. It is smooth in appearance, it is shiny, it has a deep brownish pigmented appearance to the foot, to the skin, rather.

The toe is in the cocked-up position; it is pushed up. The second and third toes likewise are pushed up.

When you ask the patient to move his toes, instead of moving them in this position, he just has a little wiggle movement. The great toe cannot be moved at all. It hasn't got the function of weight bearing which a normal great toe has. A normal great toe which is flexible allows a patient to walk with a flexible gait. The great toe especially is (487) used for push-off purposes. When one walks he pushes off with the great toe and progresses in that manner. Once the function of the great toe is lost there is undue strain which falls upon all the joints of the foot and one has a painful foot and this is the condition.

Q. I beg your pardon? A. This is the condition we have.

Q. What, Doctor, in your opinion is the future of Mr. Grunenthal's foot? A. The foot is not a useful one for work requiring, standing or climbing or use of the foot in normal work, especially his type of work.

Q. And in your opinion is there anything that can be done to improve it in the future, or will it remain about the same, or will it get worse? A. Well, if the pain becomes unbearable, the only thing to do is to remove a portion of the foot.

* * * * *

(488) * * * Q. Assuming, Doctor, Mr. Grunenthal has had continuous pain in his foot up to the present time, what is your opinion as to what will be or may have to be done for the foot if that pain continues in the future? A. The combination of pain and loss of function in that forefoot renders that portion of the foot a pretty useless member and if the patient (489) refuses or is unable to live with the discomfort then we can offer him surgery to relieve him of that pain.

Q. Is there anything else? Any other thing than that that can be offered in your opinion for his improvement? A. No. As the skin breaks down, the skin is subject to infections and he will have to be treated for these infections. It may even break down again and form ulcers. Any slight trauma would cause a foot like this more likely to break down than a normal foot. So that it is a foot that will give him trouble as the years go on.

Q. Specifically may I ask you a question, Doctor, as to whether Mr. Grunenthal's foot in its present condition is more or less likely to breaking down and ulceration than the normal foot? A. I would say yes.

Q. Now, Doctor, in your opinion, specifically will Mr. Grunenthal at any time in the future be able to return to railroading work or any work requiring heavy work being done while on his feet? A. I would say no. I would say it would be extremely hazardous for him to do so.

(490) Mr. Meyer: You may cross examine.

Cross Examination by Mr. Gallagher:

Q. The last examination made was yesterday, Doctor? A. Yes, sir.

Q. Did you make any written report on that? A. Yes.

Q. May I see it, please? A. Here, sir.

The Court: Those are your own personal notes?

The Witness: Yes, sir.

The Court: I see it from a distance. They are handwritten notes.

The Witness: Yes, sir.

The Court: Yes.

Mr. Gallagher: Will you bear with me for a moment, please?

The Court: Surely. You have to examine it. You haven't seen it before.

Q. Outside of your notes, Doctor, did you render any kind of a written report to Mr. Grunenthal or his attorney? A. Yes, sir.

(491) Q. Was it typewritten? A. Yes, sir (handing).

Q. Oh, this is the one that you made back in 1964? A. Yes, sir.

Q. I was speaking of yesterday's examination. A. No, sir.

The Court: Mr. Clerk, would you mind marking for identification the handwritten notes.

(Defendant's Exhibit L marked for identification.)

The Court: Return it to the doctor.

Q. When you examined Mr. Grunenthal yesterday, Doctor, you testified that you found his right foot warmer, is that correct? A. Yes, sir.

Q. Is that considered an improvement as compared to the condition that you had noted before in 1964? A. I would think so, yes.

Q. Did you make any comparison between what you found in 1964 and what you found yesterday from the standpoint of either improvement or retard—or what would the other word be?

(492) Mr. Cohalan: Retrogression.

Q. —retrogression? A. Retrogression, yes. I compared it to my previous findings. There was—there were a few changes, and, as I say, the most remarkable one was the warmness to the foot. There was some lesser swelling over the base of the toes which he had originally shown. He showed swelling around the base of the toes. Well, that swelling had subsided. Of course, the bump on the

dorsum of the—on the ball of the great toe was now missing. It was replaced by a scar which was now tender.

Q. Would that be considered an improvement, Doctor? A. Well, yes and no. He's now replaced with a tender scar instead of a tender bony lump.

Q. Well, from a medical standpoint would you have any opinion as to whether or not that would impede his walking as compared to 1964 or make it easier for him to walk as of yesterday's date? A. The ball of the great toe doesn't hit the floor anyway so that I don't think that changed his gait very much.

Q. Would the fact that the right foot was (493) warmer indicate that the foot was getting more nourishment than when it was colder? A. I would say that the fact that the foot is warmer, indicates that the skin is getting more nourishment. I don't know whether the deep structures are.

Q. But at least some part of the foot is getting more nourishment than when it is cold, is that correct? A. Yes, so far as what we call the superficial circulation is concerned.

Q. Would that be any indication that more chemicals are flowing into the foot? A. I don't think they are because these metatarsal bones are still long and thin. They are not responding to weight bearing.

Q. Well, in answer to one of Mr. Meyer's questions, I may not have gotten it clearly. You indicated that certain physical findings that you found there yesterday would indicate that there would be a deterioration in the future.

Do you follow me? A. Yes.

Q. Well, my question now is does it necessarily (494) follow that the symptoms or the facts that you found or the conditions that you found that there will be a deterioration in the future? A. Well, actually he did have a recent infection, I think, in March of 1966. He developed an infection of the foot requiring care by a dermatologist. I think that type of foot is subject to infections and trouble. If you ask me when it will occur, I don't know.

Q. Did you look into the condition, the dermatitis condition that he talked about in March? A. No, it was not present when I saw it.

Q. Could that be caused by other causes other than this particular— A. Well, yes, an infection is an infection. It can be caused by any kind of infection, but I think that type of foot is more prone to infections than his sound opposite foot would be.

Q. Did you go in to any detail with Mr. Grunenthal as to the type of work that he did for the railroad? A. Well, it was my impression that it was a laboring, laborer's type of work; he was on his feet a lot and it required the usual work of a man (495) being on his feet. I didn't go into any great details.

Q. Is there any kind of work that you would recommend for a man with this type of disorder? A. I think a sedentary type job he should be safe, no one steps on his foot, if he keeps out of trouble.

Q. Can you give us an example of some types of sedentary job you think he can handle? A. Well, a desk job.

Q. A desk job in the railroad? A. Whoever has a desk job for him, I don't think it would make much difference, so long as he doesn't have to stand much and there is no chance of anyone stepping on his foot.

Q. Did you inquire of him whether or not he drives an automobile? A. I'm sorry, sir?

Q. Did you inquire of him whether or not he drives an automobile? A. I don't think I did.

Q. Well, what would your opinion be as to him working perhaps in some kind of capacity driving an automobile? Do you think he would be able to do that? (496) A. I think he should be able to drive a passenger automobile, I wouldn't say a truck or anything like that.

Q. Particularly one with an automatic drive on it? A. I think with an automatic drive he should manage, yes, provided it is not a full-day driving job.

Q. Well, can you tell us how long he would be able to drive an automobile during the day? A. Well, that is

difficult to say. A foot like that needs a little exercise and I would suggest exercise to him. To be seated in one place without getting a chance to sort of limber up; I would not advise that to this man.

Q. In other words, Doctor, you also say that it would be advisable for him to try to move around at least for limited periods during the day for it will improve the condition of the foot, is that correct? A. Yes, a little exercise should be good for him, yes, sir.

Q. As a matter of fact, that will improve the circulation, will it not, sir? A. Well, we always hope it will, we don't (497) know whether it would.

Q. Aren't the chances are that it would? A. I would suggest it to him with the thought that it might improve his circulation, yes.

Q. All I want to know now, Doctor, is, we are not faced with a man who is totally and completely disabled, are we? A. No, he can do sedentary work as I indicated.

Mr. Gallagher: Thank you very much.

The Court: Mr. Cohalan.

Cross Examination by Mr. Cohalan:

Q. I just want to know from the doctor whether they ever recommended an orthopedic shoe. A. No, I don't think I saw anywhere in the records an orthopedic shoe.

Q. Would that be of help to him? A. An orthopedic shoe would be of help, a well fitting custom shoe would be of great help to him, yes.

Q. That hadn't been utilized? A. No, if he hasn't—the records do not reveal that.

Q. Would that not also protect his foot from (498) outside trauma? A. That is hard. No shoe can actually be made that is so self-protecting.

Q. But some more so than others, is that right? A. Perhaps a little more so, but that is all.

* * * * *

By the Court:

Q. Doctor, will you indulge me for just a moment. We have always been told in a general way that Nature has these compensatory forces, that when there is an invasion, so to speak, that Nature redoubles its efforts to resist the invasion, whether it is by microbes or by some hurt or another kind. Am I making myself clear so far? A. Yes.

Q. When we receive a wound, we are told that there is an onrush of blood to absorb the injury. That is using that term rather loosely. But am I right so far? A. Yes.

(499) Q. What does medicine say? How does medicine account for the fact that when this man had this crushed foot, why is it that circulation diminished? What is there about the anatomical structure that doesn't call on the circulation to supply even greater abundance than normal? Why does it actually pull back, so to speak, or is there an answer? A. Well, I don't know if I can give you any answer to that, except that where the injury is severe enough, nature just can't cope with it up to a point. He didn't lose his leg, you notice. He could have lost it. And the sympathectomy perhaps saved his limb for him. So that when nature was given a chance of responding, locally there was so much damage done by the trauma that all nature could do was to just scar up the area, that is all.

* * * * *

By Mr. Gallagher:

Q. When you examined Mr. Grunenthal back in 1964, Doctor, did you have any opinion at that time (500) outside of railroad work whether or not he could perform any types of sedentary work at that time? A. Well, I had indicated he was unable to return to his work at that time, but from my examination he was totally disabled because we were dealing with a cold foot, the foot was still cold. I was still afraid that he might end up with an amputation and I so recommended it.

Q. Regardless of that, though, would he have been able to do some kind of sedentary work sitting at a desk? A. No, I would heartily say no.

Q. Well, would you be able to express an opinion as to at what point Mr. Grunenthal was capable of doing sedentary work? A. I would say somewhere between these last two examinations, sir. I couldn't tell you at what point.

Q. Would you say 1965, perhaps? A. Well, I saw him in March of 1964. By the time I saw him in 1967 he was still in a lot of pain with his foot. There is the pain element here, too. It is not only the poor functioning foot, but there is the pain element, too, so that would restrict the (501) amount of work he could do, even if it is sedentary.

Q. Would he be capable of some work perhaps even on a limited basis? A. On a limited basis, yes, I would say so.

* * * * *

(503) * * * FRED WURPEL, JR., called as a witness by the plaintiff, having been first duly sworn, testified as follows:

Direct Examination by Mr. Meyer:

Q. Mr. Wurpel, where do you live? A. Marysville, Pennsylvania, sir.

Q. And what is your business or occupation? A. I am now the acting general chairman of the Brotherhood of Maintenance of Way Employees.

* * * * *

Q. And does that brotherhood represent, or did it represent in 1962, the maintenance of way employees on the Long Island Rail Road? A. It did, sir.

Q. Now, your office is where? A. Philadelphia, Pennsylvania.

(504) Q. Are you familiar with the negotiated agreements between your brotherhood and the Long Island Rail Road from 1962 and prior to and since that time? A. Yes, sir, I am.

Q. So far as the maintenance of way men whom you represented, was there any compulsory retirement age required? A. No, we have no compulsory retirement agreements.

Q. Parenthetically, let me ask you this question for the record:

Carl F. Grunenthal was a member of your brotherhood in 1962 and before that time, was he not? A. He was, sir.

Q. What were the daily regular wage rates of an apprentice foreman in the year 1962?

Mr. Meyer: We will save time without your looking them up.

The Witness: All right, fine.

Mr. Meyer: Because they are stipulated.

Q. Can you confirm that the wage rate for an apprentice foreman on the Long Island Rail Road in 1962 and 1963 was $2.598 per hour? (505) A. That is correct, sir.

Q. That in 1964 it was raised to $2.688? In 1965 it was raised to $2.788? A. That's correct.

Q. In 1966 it was raised to $2.868? A. That is correct.

Q. And this year in 1967 as of January 1st it was raised to $3.0114? A. That is correct.

Q. Was there an agreement between the brotherhood and the railroad as to payment for overtime and for holiday or Saturday and Sunday work? A. Yes, we have a penalty rate time and a half time rate for anything over eight hours or over 40 hours in the week or on the rest days or on holidays, with double time commencing after 16 hours of continuous service.

Q. And that remains the same? A. That remains the same.

Q. And isn't it a fact, Mr. Wurpel, that all employees of the Long Island Rail Road who were members of your brotherhood and were working in October of 1964 by reason of an agreement between the brotherhood and the railroads, including the Long Island, (506) have now protected employment so that they cannot be fired except for

cause, that is, misconduct? A. All those employees employed on October 1, 1964, who had two or more years of service are protected employees.

Q. During these years that we have talked about from 1962 to the present time, was there any method under the brotherhood agreement with the railroad by which the brotherhood could insist on the railroad putting a man to work unless he were fully physically qualified to do every type of job included in his work classification? A. No, we have no agreement.

Q. And do you have any method of insisting that the railroad put a man back to work? A. No. No, to the contrary, we have an agreement setting up a board of doctors if we, or if the organization should state that they would go back and the railroad would hold them off. In that case, then we would set up a board of doctors to determine whether he was physically able to go back over the railroad's objection.

The Court: Yes, but the point is even if the doctors said so, the railroad wouldn't be compelled (507) to take him?

The Witness: Under our present agreement, sir, with the board of doctors, the two doctors, our representative and the railroad's representative, get together. If they disagree, sir, then they appoint the third individual whose decision is final and binding.

The Court: All right.

Q. Just one point. If there is no doubt that a man cannot do all of the work required in his job classification then he doesn't even come within that, does he? A. No, sir.

Mr. Meyer: You may cross examine.

Cross Examination by Mr. Gallagher:

Q. The agreement doesn't preclude the parties from meeting on matters of mutual interest, though, does it, sir? A. No, it does not, sir.

Q. In other words, is it theoretically possible that Mr. Grunenthal could approach the railroad and say, "I'd like to work. Would you consider me working if we could work out a deal"? A. It's possible.

(508) Q. I beg your pardon? A. It is possible.

Q. And if in the future Mr. Grunenthal's doctor says to him, "I think now that you are able to do work in the maintenance of way department and I will so certify," if Mr. Grunenthal came to the railroad with such a certification and the railroad refused to acknowledge that certification, could you then ask for a three-man board? A. I'm going to have to I think straighten something out, because to answer the question, I am not hedging, you all realize that as of January 22nd, we do not represent, or 23rd, pardon me—

Q. Don't give an answer other than what you are going to give. A. All right, sorry.

Mr. Gallagher: I think it would just—

The Court: Just answer the question, Mr. Wurpel.

A. Under our agreement that we have on the railroad?

Q. Yes. A. We could, if our doctor, which we had examine Mr. Grunenthal, said he felt he was able to go (509) back and work also, we then could go to the railroad and ask them to appoint a board of doctors or we wanted a board of doctors and they would appoint their doctor, and when they met, if they were undecided, then they would select the third party—third doctor who would make the decision.

Q. And even in the event that you came to the railroad or if the employee came to the railroad and said, "I have a doctor's certificate, I want to go back to work," and the railroad doctor said, "You can't go back to work," and you asked for a three-man board and the railroad said, "I won't take a three-man board," wouldn't the employee still have a remedy to go to the Railroad Adjustment Board? A. We would go to the Long Island-Pennsylvania system, we would have gone to the Long Island-Pennsylvania Rail

Road System Board of Adjustment. We have our own board on the problem.

Q. That's right. In other words, even if the railroad took the position that, "We don't accept your doctor's certificate, we won't take a three-man board under the contract," the employee would still have a right to go through the machinery of the Railway Labor Act, is that correct?

(510) A. That's right.

Q. Is that correct? A. That is correct.

Mr. Gallagher: That is all.

Cross Examination by Mr. Cohalan:

Q. Mr. Wurpel, couldn't Mr. Grunenthal have gone to some other part of the railroad to apply for employment? A. I couldn't answer that.

Q. Outside of his maintenance of way? A. I couldn't answer that.

Q. You have no experience in that? A. Because I have no control over any other department other than the Brotherhood of Maintenance of Way, that is all we represent.

Q. Under your agreement he would have the privilege to go? A. No, not under our agreement.

Q. You have no connection with that? A. No, sir.

Q. No connection at all? A. No.

The Court: All right, Mr. Meyer.

(511) *Re-direct Examination by Mr. Meyer:*

Q. Just to clarify this one thing, before going to the selective board of doctors or through the various other procedures, wouldn't it first be required that the employee's doctor or the brotherhood's doctor certify that he was able to perform all of the duties of his job classification? A. That is exactly right, sir.

* * * * *

CARL F. GRUNENTHAL, the plaintiff herein, recalled as a witness in his own behalf, having been previously duly sworn, testified as follows:

* * * * *

(512) * * *

Direct Examination by Mr. Meyer:

Q. Mr. Grunenthal, coming to this phase of the case, would you tell the jury and the Court what training and education you had? A. I only had three years in high school. And that is all the education I had.

Q. And how old were you when you started to work for the Long Island?

The Court: He already told us. 21, 20?

The Witness: 20.

The Court: Right, I think you didn't know I would remember. You are now 45, right?

The Witness: Right.

Q. Now, during the years that you worked for the railroad what type of jobs did you have? A. Well, just trackman work.

Q. Was it all laboring work? A. Yes, that is trackman, laboring.

Q. And did it require you to be on your feet most of the time? A. Yes.

The Court: May I interrupt? What was your weight when you started—

(513) The Witness: My weight?

The Court: Let's say what was your weight on the day we are concerned with in September of 1962?

The Witness: About 175.

The Court: 175. And you are what, six feet tall?

The Witness: Yes.

The Court: All right, sir.

Q. What was the general condition of your health before this accident? A. Good.

Q. And had you ever had any injury to your feet or to your legs at any time? A. No.

Q. Did you have any difficulty with them? A. No.

Q. At any time? Now, come down back to the point of the injury. We left it when the tie fell on to your right foot and at that time you told us that you were wearing what you called safety shoes. A. Yes, sir.

Q. What sort of shoes are they? A. They are a regular high work shoe with the (514) steel tip that covers the toes.

Q. Now, what happened to your foot? A. The tie fell on—fell on the end of the steel tip right by the toe and in my instep. Then it made a hole right through the foot.

The Court: Demonstrating with his right foot.

Q. Now, did you pass out or were you conscious completely or just what was your condition? A. I guess I must have saw stars. I mean I was more or less dazed.

Q. And then will you just go on and tell the jury and the Court what was done for you then? A. Well, after the accident, the general foreman at that time, Al Casale, helped take my shoe off and when we saw the extent of the accident he ordered a small—

Q. What did he see? A. Well—

Q. What— A. Just blood.

Mr. Gallagher: I object.

The Court: Wait a minute. Counsel is right. He changed the question. What did you see? (515) That stands.

The Witness: All I saw was blood and I couldn't take my stocking off because the blood was sticking right through.

Q. What did they do then? A. They put me in a truck and took me to the hospital.

Q. That was Queens— A. Yes, Queens General Hospital.

Q. And what was done for you there? A. Well, they cut the sock off, I had X-ray treatments and then he put —put the foot in a cast.

Q. And you remained there for a week? A. For a week.

Q. Till the 26th. What was your condition at the time that you were sent from there over to the Brunswick Hospital on the 26th? A. Well, I still had the cast on just like the first day.

Q. All right. And what did you feel? What was the condition of your foot? A. Well, I believe it was very bad. I couldn't—

Q. What—were you in pain? (516) A. Oh, yes.

Q. All right, that is all we really have to know.

What did they do for you at Brunswick on that first occasion? A. Well, they took more X-rays, they cleaned it up and they put a new cast on it, went up to the knee.

Q. And you were there from the 26th until the 1st of October, is that right? A. Yes.

Q. All right. Now, were you still in that cast up to your knee when you were discharged from Brunswick that time? A. Yes.

Q. Now, who took care of you during that time? A. Dr. Prisco.

Q. And he was a hospital doctor, wasn't he? A. No, he's an orthopedic man.

Q. I mean— A. Yes.

Q. —you first met him at the hospital? A. Yes.

(517) Q. You never met him before, he never treated you before? A. No.

Q. You were discharged from the hospital on the 1st of October, 1962.

Then what was done for you before you returned to the hospital again? A. Well, I visited the hospital once a month where they put a—or every two weeks and they put a new cast on it. They looked at the foot, put new dressings and a new cast on.

Q. And so far as you could feel or see did the condition of your foot during that period seem to improve or remain about the same? A. Well, I was on crutches and it felt a little better, it was getting—

Q. All right. You were put back into the Brunswick Hospital on February 1st and you stayed there until February 23rd, 1963.

What was done for you during that time? A. They took the cast off and every day I had a new dressing on the infection I had.

Q. And what did you see? What was the condition of your foot at that time? (518) A. Oh, it was swollen and it was still painful.

Q. Was the cast reapplied before you were discharged that time from the hospital or were you discharged without a cast? A. Without a cast.

Q. Without a cast. And were you after February 23rd, 1963 permitted to go around on crutches again? A. Yes.

Q. All right. Now, between that discharge from the hospital and when you went back again in August of 1963, what was your condition? A. Well, that—I could still walk. I could walk without crutches then. I think a month or two before they took the crutches away from me.

The Court: Do you remember about when that was, Mr. Grunenthal? When did they take the crutches away?

The Witness: Oh, about June.

The Court: June of 1963?

The Witness: June of 1963.

Q. And during this time you were still returning to see Dr. Prisco? (519) A. Yes.

Q. All right. And then what occurred? A. Well, that hole that was in my instep wasn't closing all the way and she was oozing, so this Dr. Prisco put a skin graft. They took it from my thigh and put it down on my foot, on my instep.

Q. Now, you haven't told us about any hole before this time.

When did you first notice that? A. Well, right after they took off the cast in February.

Q. And what was it? Can you tell us what— A. Well, it was the size of a quarter and it was always oozing.

Q. I see. And that is what you went back into the hospital for in August? A. Well, I went back in February for them to see if they could really close it up.

Q. Yes? A. And after I was discharged in February it was still open and it was open right up to August when the time I went into the hospital.

Q. All right. A. For the skin graft.

(520) Q. Now, then, you were back in the hospital from the 30th of August until the 21st of September of 1963? A. That's right.

Q. What did they do for you during that period? A. Well, they was—they always wanted to know if it was taking, if the skin was taking on it and only in one corner the skin was, I see taking, it was—I would say a small hole still open and she was still oozing.

Q. How did that progress while you were in the hospital and what was its condition when you were discharged that time? A. Well, it progressed very slowly.

Q. How was it by the time you were discharged from the hospital? A. Well, the skin only took in one corner.

Q. Now, was anything done for you after your discharge in September of 1963? A. Well, yes, I went back in—

Q. No, I mean— A. Oh, no.

Q. —before, right after you were discharged. A. Well, no, they were just—they just told (521) me to keep it clean and to bathe my foot. Then I was walking pretty good then without crutches or anything and like—

Q. In other words, you were improving pretty well at that time? A. Yes, sir.

Q. All right. Now, what's the next thing that happened as you recall? A. Well, around October Dr. Prisco gave me a note saying that I could go back to work but on light duty, so I brought the note in to the railroad and I gave it to my supervisor and he gave me a desk job up in the Koven freight yard and I stayed there for two weeks.

Q. During that time, what did you do? A. I was making out order blanks for material, different materials.

Q. Now, you didn't have any work to do on your feet at that time? A. No.

Q. And what was the condition of your foot during that period of time as you recall? A. Well, she was swelling up and the doctors wanted that hole to really close up. (522) Q. Was it still open at that time? A. It was still open at that time.

Q. Now, you indicated that you stayed at that job for two weeks. A. Two weeks.

Q. And then what occurred? A. Well, then they decided that I should see a Dr. Urb and they want to give me that sympathec—they call it, I don't know.

Q. Sympathectomy. A. Well, sympathectomy, and then I told the railroad about the operation and then I went and had it done.

Q. Now, you went back into the hospital then on December 10th and stayed until December 17th of 1963, is that right? A. Yes, sir.

Q. Now, was it during that hospitalization that the sympathetcomy was done? A. Yes.

Q. Do you recall what that was? A. Well, I heard the doctor this morning describe it.

Q. All you knew was when you came out you were (523) cut across the side? A. That's right.

Q. What did you personally observe as to how your foot progressed following that operation? A. Very good. I thought so anyway.

Q. And you continued then from December 17th of 1963 until June 10th of 1964 before you went back into the hospital.

What was your condition between that time, the condition of the foot? A. Well, it was all right. I was walking around.

Q. And— A. But that bone spur was giving me trouble when I was walking.

Q. Now, had the pain in the foot subsided, had it gotten better, gotten worse, remained the same during that time? A. About the same.

Q. Tell us about the bone spur, when that started to grow or become uncomfortable and painful, and just what it was. A. Well, before I went to have this operation by Dr. Urb, that spur was there but they had to close (524) the hole up first before they had to operate on it and during the course from the end of that period until June they were just letting that operation do its best.

Q. I see. Now, during that time had what you call the hole in your foot closed up? A. Yes.

Q. And had the scar from the operation healed all right? A. Yes.

Q. So that what was the purpose of your going back into the hospital in June of 1964? A. Well, to have this bone cut off that I could walk better.

Q. And that was— A. And less pain.

Q. And that was operated on at that time? A. That's right, yes.

Q. Now, June 15th of 1964 you were discharged from the hospital after that operation? A. Yes, sir.

Q. And after that period of time did you find that you had less pain or more pain or about the same with your foot? (525) A. Less pain, less pain where the bone spur—

Q. And after a short period of time after the operation you were, I suppose, able to walk again, weren't you? A. Yes.

Q. How were you getting along then as you came down into the fall of 1964? A. All right. I would say all right.

Q. And were you able to walk fairly well? A. Yes, sir.

Q. Were you without pain or were you still having any pain in the foot? A. I always have a pain, it is like a dull toothache, to this day.

Q. Now, then, what occurred in the fall of 1964? A. I went back to the railroad—well, first of all, Dr. Prisco gave me a slip again.

Q. Same sort of a slip? A. Same sort of a light-duty slip that I could go back to work but only on light duty. I went up to the railroad and they refused me a light-duty

job. So then they sent me down to their doctor and he more or less said I couldn't go back to work.

(526) Q. First of all, will you tell us, so far as you can remember, when that was? A. In November of 1963.

Q. 1964? A. Oh, 1964, I'm sorry, 1964.

Q. Since that time have you at any time been given a return-to-duty slip or a qualification for return to work by the railroad? A. No.

Q. Now, since that time—now starting in the fall of 1964 and I would come down to the next couple of years quickly—how has your condition been, has it improved, remained the same, gotten worse? A. I would say remained the same.

Q. During all that period of time, your foot has been approximately the same condition that it is now? A. I think so, yes.

Q. Now, some mention was made about some breaking down of the skin on your foot. Would you tell us about that? A. Yes. Well, right up to last March, my foot—my foot right by my ankle it breaks open, it is like a rash, so I go to this dermatologist and (527) he gives me some salve to put on it and that is all I know about that. I didn't see any reports on that.

Q. This is not because the foot is bumped or anything of that sort? A. Oh, no, no.

Q. Now, of this period of time since the fall of 1964 have you tried to get work elsewhere? A. Yes.

Q. And what efforts have you made to get some sort of a light job that you would be able to do? A. Well, first of all I tried to get a filing job, or—like a filing clerk or something like that, but everybody seems to think I am getting a little too old for it to be in an office now and I have no experience and every—that is what it amounts up to, practically every place I go to.

Q. Now, have you at any time during that period been able to obtain any work? A. Yes.

Q. And where did you obtain some sort of a job? A. Well, for the American Legion in Massapequa. Every—two

days a week, a couple of days a week I (528) work as a custodian.

Q. And when did you first get this custodian's job? A. Well, six months—about a year, I guess.

Q. And you work there two days a week, Mr. Grunenthal. How many hours a day? A. Oh, it varies. It's according to how I feel and everything else.

Q. Well, are you able to make your own hours, Mr. Grunenthal? A. Yes, yes.

Q. And depending on how your foot feels you are able to sit or stand or whatever you want to do, is that right? A. Yes.

Q. What do you get paid? A. $15 for the two days.

Q. That is $7.50 a week?

The Court: $7.50—

Q. $7.50 a day, sorry, your Honor. A. Yes.

Q. Now, the present condition of your foot, Mr. Grunenthal, as you feel it, you indicated you always have a pain like a toothache. How does it affect your (529) walking, if it does in any way? A. Oh, yes, I can't walk down stairs. I have to go down sideways.

Q. And what is the reason for that? A. Well, I can't bend my foot, my toes.

Q. Does it in any way affect you when you are sitting, if you sit for any length of time? A. Yes, it does.

Q. In what way does it affect that? A. It feels like it is going—it is going to burst my shoes open.

Q. What do you do about that? A. I stand up and walk around a bit.

Q. Now, does the weather in any way affect it? A. Yes.

Q. In what way? A. Oh, even the day before, before it rains or snows, any kind of damp weather, inclement weather, I feel it.

Q. Feel it in what way? A. Oh, painful.

Q. That is, a pain different from what you have ordinarily? (530) A. Oh, yes, much different, yes.

Q. What do you do for it? What do you do for the foot? A. I bathe it in salt water and that really does a good —a good job.

Q. Well, can you tell us a little more about that? How frequently do you find that you have to do it and what does it do for you? A. Well, I bathe it every day and it really helps me, say, for about three or four hours.

The Court: Is that pursuant to the doctor's instruction?

The Witness: I don't know—yes, he did tell me to bathe it.

The Court: In salt water?

The Witness: In salt water.

The Court: Hot, or what?

The Witness: No, just lukewarm. In fact, the best water for it is the ocean water.

The Court: When you say "the best," why do you say the best?

The Witness: When I go down to the surf and I let the waves down on it.

The Court: What you mean is—

(531) The Witness: It relieves it.

The Court: You find relief that way?

The Witness: That's right, yes.

The Court: All right.

Q. Now, have you been visiting the doctor over this period of time? A. Yes.

Q. And how frequently have you done that? A. Every six months.

Q. And has he given you any particular type of treatment? A. No.

Q. Just examined it? A. Examined it and just keep on doing what I am doing.

Q. Now, you have indicated, as much as I feel it is necessary for you to, about the pain you have had in the foot. Has that been bearable so far as you are concerned up to the present time? A. Oh, yes. I mean, I just take it for granted now. It doesn't bother me now.

Q. And other than the increased discomfort that you have indicated in bad weather, has this pain (532) up to now become much worse than it was before, or remained about the same? A. Remained about the same.

Q. Has it improved any? A. No, I don't think so.

Q. And you, sir, are now 45 years old, is that correct? A. Yes, sir.

Mr. Meyer: You may cross examine.

Cross examination by Mr. Gallagher:

Q. When was it that you went back to work at the Koven yard desk; was that in 1963, Mr. Grunenthal? A. 1963, yes.

Q. And you left at that time because you had to go back into the hospital, is that correct? A. Yes, sir.

Q. And did I understand correctly that around the time of the fall of 1964 you were able to walk fairly well? A. Yes.

Q. And was it in 1964, then, that you went back to the railroad and asked to be put back to work? (533) A. Yes.

Q. Did you serve any time in the Armed Services, Mr. Grunenthal? A. No, sir.

Q. Did you speak to anyone in particular in the railroad at the time that you went back in 1964 about going back to work? A. Yes.

Q. With whom did you speak? A. Mr. Glick, sir.

Q. And did you discuss any types of jobs that you could hold? A. Yes.

Q. Did any question come up that you couldn't be assigned to particular types of jobs because of seniority problems? A. No.

Q. Did you discuss any situation that you couldn't be put in other kinds of jobs because you had to pick a job? A. I don't recall that.

Q. Well, isn't it a fact, Mr. Grunenthal, that the job that you had on the date that you were hurt was a job that you picked? (534) A. No, sir.

Q. That you bid in for? A. No, sir.

Q. But what was your title on the date that you were injured? A. Foreman.

Q. And how long had you been a foreman? A. A couple of years.

Q. And before you became a foreman, what was your title? A. Trackman.

Q. And a trackman, is that a job that you would have to bid in, based upon seniority? A. Only on—no.

Q. How do they assign the jobs as trackman? A. Well, you have—they have a number of gangs, say ten gangs, and then they say put ten men in a gang.

Q. But once a man gets put in a gang—

Mr. Gallagher; Withdrawn.

Q. In your branch of the railroad, do they use the term "owning the job"? A. Not a trackman.

Q. Do you understand what "owning the job" (535) means? A. That is a foreman, yes.

Q. Well, will you explain to the Court and jury what you understand by the term "owning the job"? A. Say we have ten gangs, every gang is a number and if foreman No. 5 wants to bid in on—if he wants No. 1 gang, he has to have seniority over No. 1 and then he owns that job.

Q. Well, when you came back in the fall of 1964, were there any foreman jobs open? A. I don't recall.

Q. Well, were there any jobs available, or any people in jobs over whom you had seniority?

The Court: Excuse me. I just want to follow this, Mr. Gallagher. You are not contending that when this witness went back in 1964 he was expecting a foreman's job, are you? Was he capable of being able to undertake a foreman's job in 1964?

Mr. Gallagher: I am not sure, your Honor. I am trying to develop why he didn't get back, what was open and what was available. I honestly don't know.

The Court: Can you answer directly? Do (536) you know why they didn't put you on in 1964 any kind of work?

The Witness: No.

The Court: Did they tell you?

The Witness: Well, they told me, the doctors told me, the company doctor told me I couldn't go back to my job.

The Court: Yes, but why? Did he say so?

The Witness: Yes, my foot.

The Court: All right. So it was the doctor for the railroad who said that?

The Witness: That's right, yes.

The Court: All right.

Q. Did you ask the company doctor at that time if there was any other kind of a job that you could fit into? A. I don't recall.

Q. Did you take it up with your brotherhood at that time? A. I tried to get in touch with a Charlie Bell, but he was in the hospital and later on I found out he just died recently. He was in the hospital all that time, so I don't know who was the representative.

(537) Q. You mean you tried to reach somebody in the brotherhood for the purpose of discussing your status about going back to work but you couldn't reach somebody because he was sick? A. That's right.

Q. And you just let it lay there? A. Yes.

Q. You didn't pursue it any further? A. No.

Q. Did you have a lawyer at that time? A. Not at that time. 1964? I don't recall now if I had. I don't know. I don't recall.

Q. So you went back— A. Oh, I believe I did have a lawyer at that time.

Q. Did you take it up with him? A. Yes.

Q. Did he give you any advice one way or the other? A. I don't recall.

Q. Did he urge you to keep looking for the job?

Mr. Meyer: Oh, now, if your Honor please, I must object to that.

(538) The Court: Objection sustained.
Mr. Meyer: The man is not qualified.
The Court: Objection sustained.

Q. Well, after the company doctor told you you couldn't work, did I understand you correctly you took it up with Mr. Glick or Mr. Gluck? A. Yes.

Q. And what did he tell you, if anything? A. Well, he went upstairs and saw somebody upstairs, and I don't know who he saw. Then he came down and told me, "You failed the medical and we can't take you back."

Q. And then you went to look for somebody in the brotherhood, in the union, right? A. Yes.

Q. And you couldn't reach anyone, is that correct? A. That's right.

Q. And then you just let the matter drop? A. Yes, sir.

Mr Meyer: I object to that your Honor. He talked to counsel about it.

The Court: Yes. He said they met and he said yes.

(539) Mr. Cohalan: It is not relevant.

The Court: That is relevant.

Next question.

Q. After that, for instance, in the year 1965, did you go back to the railroad and ask them for your job back? A. No.

Q. In the year 1965, did you try to locate anybody in the brotherhood to assist you? A. No.

Q. Did you talk to your counsel about it? A. I don't know—I don't recall if I did or not.

Q. Did you take any affirmative steps during 1965 to try to get back to work on the railroad?

Mr. Meyer: Now, if your Honor please, I object to this line of questioning because there is absolutely no evidence, there couldn't be any evidence, that he could qualify in any other type of job. Or that he could be put

back on the railroad, even if the railroad wanted him to as long as he wasn't physically qualified.

The Court: Yes. Mr. Meyer, you are now supplying an argument, but that doesn't preclude (540) cross examination. Even if he goes to the veracity of the witness, if that is the sole purpose, I would have to admit it. The jury can put such weight as they think it warrants, but I don't think that excludes it and you might very well argue what your deduction is from the testimony, but I can't exclude the testimony.

Mr. Meyer: I see, your Honor, sure.

The Court: Counsel wants to know, what did you do about this job, trying to get a job in 1965? Why didn't you go back to the railway? You had been there for 25 years. He wants to know why didn't you go back in 1965. What's the truth, what is the answer?

The Witness: Because I was getting a disability pension from the railroad.

The Court: Why didn't you say that?

Mr. Gallagher: Well, now, your Honor, may I approach the bench?

The Court: Come on.

(At the side bar.)

The Court: That is what you were going after all the time.

Mr. Gallagher: No.

(541) The Court: You were leading to it.

Mr. Meyer: Yes, that is why I tried to stop him.

The Court: You kept on hammering away for no good reason at all.

Mr. Gallagher: I know this rule as well as I know my own heart. Do you want—

The Court: I will go in.

Mr. Gallagher: I discussed this this morning, I want to warn you don't bring up—

The Court: Why did you keep on hammering away in 1965? He already told us he was rejected medically in 1964 and you kept on going after him with regard to 1965.

Mr. Gallagher: I didn't.

The Court: Yes, you did, and in fact you produced the argument Mr. Meyer advanced and I figured maybe on the question of veracity I would let you go on, but you kept on being persistent.

Mr. Cohalan: Because he could have gotten a job somewhere else.

Mr. Gallagher: I was frank to admit—

The Court: Off the record.

(Discussion off the record.)

(542) (In open court.)

The Court: All right. Let's proceed.

By Mr. Gallagher:

Q. Is it a fact that in 1964, around the fall, Mr. Grunenthal, that your doctor told you that you were able to perform light duty? A. I believe so.

Q. And exclusive of going back to the railroad, did you look for work elsewhere? A. Yes.

Q. And can you tell the Court and jury the number of places that you went to?

The Court: All right now. Do you understand the question?

The Witness: Yes.

The Court: Now answer it, we don't know, we weren't there. Tell us what you did.

The Witness: Well, during that course of the period I went to about four or five different companies and I tried to get a job. One job was in the stockroom and when they found out I had a bad foot they wouldn't take a chance.

Another place was a salesman's job.

The Court: Do you remember the name?

(543) The Witness: Yes, the White—White's Discount House—store.

The Court: Yes. When did you go there, do you remember?

The Witness: Around Christmas time.

The Court: Of what year?

The Witness: Of 1965.

The Court: All right.

The Witness: And I worked there for about four or five days but I couldn't stand it.

The Court: What kind of job did you do?

The Witness: Salesman's job.

The Court: Salesman, behind the counter?

The Witness: Yes.

The Court: What did you sell?

The Witness: In the toy department.

The Court: Toy department. And you found you couldn't take it because you couldn't stand the pain, is that it?

The Witness: Yes.

The Court: What else?

The Winess: I went to a plaster place over in Farmingdale.

The Court: Do you remember the name?

(544) The Witness: Offhand, no.

The Court: Do you remember when it was?

The Witness: In 1966.

The Court: Last year?

The Witness: Yes, last year.

The Court: Beginning or middle?

The Witness: Oh, right after—in January.

The Court: How long did you stay there?

The Witness: I put in an application there and once they found out I had a bad foot they wouldn't even attempt it.

Then I tried in a delicatessen, working a couple of hours a night. It lasted about a week there. It was too much.

The Court: Do you remember where that was, sir?

The Witness: Yes, in May.

The Court: Of last year?

The Witness: Of last year.

The Court: Do you remember the name of the place?

The Witness: Yes, sir, Park Delicatessen in Massapequa.

(545) The Court: All right. Any other places that you tried?

The Witness: No, but right now I have an application in Grumman's and I didn't hear anything about that.

The Court: Did you put in applications anywhere else?

The Witness: No.

* * * * *

By the Court:

Q. What were the hours you put in on an average before the accident? A. Well, that varied, your Honor. Because of quite a bit of overtime. At least nine hours a day.

(546) Q. At least nine hours a day? A. Yes, for five days.

Q. Five days. A. And of course in any kind of emergency, snowstorms or hurricanes, I mean that is how it is.

* * * * *

Mr. Meyer: If your Honor please, I offer in evidence the defendant's answer to Interrogatory No. 23 in which they state that the earnings of Mr. Grunenthal in 1962 up to the 19th of September were $4,258.87.

I also offer in evidence a certified copy of the United States Life Tables and assume—

The Court: Can you stipulate to that, Mr. Gallagher?

Mr. Gallagher: Yes, sir.

Mr. Cohalan: I stipulate that.

Mr. Meyer: It shows that life expectancy of a white male, 45 years of age, which would be as of today, 27.5 years and a white male of 46 years of age, 26.6 years.

(547) The Court: Yes, sir.

* * * * *

Verdict

(580) (Jury roll called—all present.)

The Clerk: Mr. Foreman, have you agreed upon a verdict?

The Foreman: We have.

The Clerk: How do you find?

The Foreman: We award the plaintiff $305,000.

The Clerk: Members of the jury, listen to your verdict as it stands recorded. You say you award the plaintiff $305,000 and so say you all?

Jurors: Yes.

The Court: Would you like to have the jury polled?

Mr. Gallagher: Yes, your Honor.

The Clerk: Members of the jury, you have heard the verdict as it stands recorded.

(Each juror, upon being asked by the clerk, "Is that your verdict?", answered in the affirmative.)

* * * * *

(583) * * * Mr. Gallagher: If your Honor please, I move to set aside this verdict, again on the question of liability, on the ground that liability finding of the jury was against the weight of evidence, contrary to the evidence and against the law.

On the question of the amount of damages brought in by this jury, I think that the verdict (584) should be set aside. I think it should be set aside as excessive and I think in the light of the nature and extent of the injury in this case, it should be set aside as excessive and as one which is such that should shock the conscience of the Court.

* * * * *

(585) * * * The Court: Mr. Gallagher, I anticipated you, and I think that you would be well advised to make the motion on papers with a memo.

(586) * * * The Court: Sure. You have a right to move on any point in the entire case.

Mr. Gallagher: We also have the problem here, your Honor, as to the liability between railroad and the third-party defendant.

The Court: Which you decided to let the Court determine.

Mr. Gallagher: Yes, sir.

The Court: Now, that, of course, will have to await the outcome of the first step, and that is the claim by the plaintiff against the railway, so let's dispose of that first and then let's go on to the other. That is what I understood you agreed to do.

Is that not right, Mr. Cohalan?

Mr. Cohalan: Yes, your Honor.

Mr. Gallagher: My motion now is merely *pro forma*, your Honor.

The Court: All right. Then you began to cite authorities and began to reach out for cases that you weren't too sure about. I say take your time, file a brief and let's see what it amounts to. Right?

(587) Mr. Gallagher: Yes.

The Court: Mr. Cohalan?

Mr. Cohalan: I would like to join in the motion *pro forma* made by Mr. Gallagher and the privilege of submiting—the permission of the Court to file papers on it. I would just as soon argue it right now.

The Court: Well, I am going to reserve decision, anyway, Mr. Cohalan, and you can give me whatever memoranda you wish, according to the rules of the court.

Mr. Cohalan: Would your Honor give us time for it?

The Court: Surely. Ten days.

Mr. Meyer: Your Honor, I have—

Mr. Cohalan: I think I will be engaged in trial for the next ten days.

The Court: Well—

* * * * *

(687)

Motion of The Long Island Rail Road Company to Set Aside Verdict

(Title Omitted in Printing)

SIRS:

Please Take Notice, that the defendant and Third-Party Plaintiff, The Long Island Rail Road Company, moves this Court before Honorable Irving Ben Cooper at his Chambers, Room 2904 of the United States District Court, Foley Square, Borough of Manhattan, City of New York, on the 14th day of March, 1967, at 10:00 a.m. of said day or as soon thereafter as counsel can be heard for an order setting aside the verdict of the jury rendered on March 2, 1967, in favor of the plaintiff and against the defendant and third-party plaintiff, The Long Island Rail Road Company for the sum of $305,000 and for an order directing judgment in favor of the defendant and third-party plaintiff in accordance with its motion made upon the trial for a directed verdict, or, if the foregoing motions be denied to set aside the verdict for the judgment entered thereon and granting defendant and third-party plaintiff a new trial; that all the grounds and reasons for the foregoing motions are set (688) forth in the affidavit of James T. Gallagher, trial counsel for the defendant and third-party plaintiff.

March 7, 1967

Yours, etc.

GEORGE M. ONKEN

Attorney for Defendant and Third-Party Plaintiff, The Long Island Rail Road Company

* * * * *

(689)

Affidavit of James T. Gallagher, Read in Support of Motion

(Title Omitted in Printing)

State of New York,
County of Queens, ss:

JAMES T. GALLAGHER, being duly sworn, deposes and says: I am trial counsel for the defendant and third-party plaintiff, The Long Island Rail Road Company. I represented the defendant and third-party plaintiff on the trial which commenced on February 21, 1967, before Honorable Irving Ben Cooper and a jury. On March 2, 1967, the jury rendered a verdict in favor of the plaintiff in the sum of $305,000.

At the end of the plaintiff's case, the defendant and third-party plaintiff moved for a directed verdict and for a dismissal of the complaint, which motions were denied by the Court.

Defendant and third-party plaintiff also moved at the end of the entire case for a directed verdict in favor of the defendant and third-party plaintiff which motion was denied.

(690) The defendant and third-party plaintiff now moves, pursuant to Rule 50(b) of the Federal Rules of Civil Procedure for the following relief:

(a) For an order directing judgment in favor of the defendant and third-party plaintiff, notwithstanding the verdict of the jury and in accordance with the defendant and third-party plaintiff's motion for a directed verdict made upon the trial.

(b) For an order granting the defendant and third-party plaintiff a new trial upon the grounds:

(1) That the verdict is contrary to law, contrary to the evidence and the weight of the evidence and the said verdict is grossly excessive.

(2) That this Court committed reversible error in failing to declare a mistrial because of the fact that the plaintiff, Carl F. Grunenthal, talked to the witness James Finley while he was still under oath and subject to recall on the stand.

(3) In refusing to admit Finley's prior consistent statement in evidence, after the attorney for the plaintiff offered testimony to impeach him.

* * * * *

Plaintiff's Motion to Amend Complaint

(Title Omitted in Printing)

Motion Under Rule (15) to Amend Complaint.

AND NOW, March 6, 1967, plaintiff moves for the entry of an Order amending the Complaint filed in this action so that the *ad damnum* clause shall read:

"WHEREFORE, plaintiff prays judgment against the defendant in the sumof $305,000 and costs."

IRVING YOUNGER
Attorney for Plaintiff

MEYER, LASCH, HANKIN & POUL
Of Counsel

* * * * *

(742)

Memorandum Decision by Cooper, J., Denying Defendant's Motion to Set Aside Verdict

(Title Omitted in Printing)

(Not Reported)

IRVING BEN COOPER, D. J.:

This cause came on for trial February 21, 1967. By stipulation entered into by all the parties, the issue of liability was first submitted to the jury for determination. By agreement of defendants the claim over was reserved to the Court.

(743) The jury on February 28, 1967 found against the Long Island Rail Road on liability and thereupon announced (by virtue of a similar stipulation) that the railroad was negligent; that proximate cause had been established; and that plaintiff was not contributorily negligent.

The second trial stage (damages) was heard by the same jury which on March 2, 1967 brought in a verdict in plaintiff's favor for $305,000.

Third parties plaintiff and defendant made separate motions (hereinafter dealt with) to set aside the verdict. Each motion is denied.

Plaintiff moves to amend the *ad damnum* clause from a demand of $250,000 to $305,000. Motion granted.

* * * * *

The third-party plaintiff and third-party defendant separately move to set aside the verdict contending:

(744) (1) It is contrary to the weight of the evidence. This motion was denied in open court (Tr. p. 444); in any case there is ample evidence to support a finding that Finley negligently failed to obey plaintiff's signal and that this was the proximate cause of the resultant injury to plaintiff.

(2) The court erred in failing to declare a mistrial when plaintiff talked to Finley in the hall outside the court-

room, and further erred in failing to charge the jury on the impropriety of this conduct. We believe our rulings correct on this matter and adhere to our views as expressed in the transcript at p. 349.

(3) The court erred in refusing to admit into evidence a prior consistent statement (3rd party defendant's exhibit k) to bolster the testimony of the witness Finley. Here too, we are not inclined to alter our earlier ruling (Tr. pp. 346-48).

(4) Third-party defendant contends that the court erred in denying it the right to cross examine the witness Chindamo as to a signed statement of the witness (745) (defendant's exhibit i for identification). We believe correct our ruling at trial (Tr. p. 224). The interests of both defendants with respect to the contents of the statement were identical. Therefore, third-party defendant had no right to cross examine the witness on that score since there was no adverse interest.

* * * * *

The defendants move to set aside the verdict as grossly excessive.

The cases on this subject naturally offer little assistance, for each contains some factor varying in degree or intensity from all the rest. Judge Weinfeld put his finger on it (*Dagnello v. Long Island R. R. Co.*, 193 F. Supp. 552, 554, aff'd 289 F. 2d 797 [2d Cir. 1961]):

> "No useful purpose would be served in collating the various cases, except to emphasize the contrariety of individual views."

(746) We were impressed with the attentiveness of the jury throughout the course of the trial, its outward show of exemplary deportment, the considerable time it devoted to deliberating on both the liability and damage phases of the trial, and so expressed ourselves in open Court before excusing the jury.

Clearly we have no way of knowing the jury's actual evaluation of the various items making up total damages. We can and must indulge, however, in a fairly accurate estimate of factors to which the jury gave attention, and favorable response, in order to arrive at the verdict announced.

We can appreciate the heavy weight given the total trial record by the jury in plaintiff's favor. Among other impressive phases of the trial were, (a) the candor evinced throughout by plaintiff, the total absence of exaggeration in his testimony especially when describing the excruciating physical pain and mental anguish he endured since the accident (September 19, 1962), his efforts to obtain employment if only to keep his mind off his (747) incessant misery (he had been in the constant employ of the railroad for approximately twenty years and was forty-one at the time of the accident); (b) the unrebutted testimony of plaintiff's medical expert, his explanation of the highly significant entries appearing in the hospital records relating to intensive and extensive medical treatment (including a sympathectomy) undergone by plaintiff, the setting in of gangrene and the measures taken to check its advance, the impending operation to remove part of the foot and the consequent total loss of its use for the only type of work known to plaintiff, coupled with attendant pain of a "fragile" foot in the future—all this testimony was effectively direct and utterly convincing; (c) tantamount to no contest as to each item of damages was the total trial record adduced by plaintiff.

Wages lost for the period between the dates of accident and trial (5½ years) amounted to approximately $27,000. (748) With a life expectancy of approximately 27 years, plaintiff's future wages based on $6,000 per annum would conservatively amount to $150,000; discounted this would be about $100,000. However, convincing testimony not refuted was offered at trial by plaintiff demonstrating the steady wage increases in recent time for work equivalent to that rendered by plaintiff, and the strong likelihood

that similar increases would continue. It might very well follow, therefore, that the wage increases would offset the discount calculation.

* * * * *

Thus the trial record here has many unusual features, the most outstanding one being the non-controversial nature of the defense as to damages. The jury, impressed by the uncontroverted proof adduced by plaintiff, may well have adopted *in toto* its full significance and drawn such normal and natural inferences therefrom as the law endorses.

(749) We calculate the jury in its wisdom saw fit to allow an amount approaching $150,000 for plaintiff's pain and suffering—past and future. On the record here, it had good and sufficient reason to regard and assess it as excruciating, deep-seated, unrelenting and debilitating—the inducing cause of his constant misery. Reasonable and controlled reaction to pain and suffering varies with man's innate, sensitive response to the woes and laments of those stricken and bereaved—especially where clearly unearned or cruelly inflicted. Who is to say this jury was not so composed? If the jury believed such an award fair and proper, we find nothing untoward, inordinate, unreasonable or outrageous—nothing indicative of a runaway jury or one that lost its head—in its reflected resolution to so respond.

Concededly, at first blush the verdict appears excessive. However, a detailed analysis of the proof covering the items making up total damages in the light of this particular trial record, with resounding emphasis in plaintiff's favor all down the line, points to a jury that was generous—not generous to a fault or outside the (750) bounds of legal appropriateness.

We are told, and properly so, that the jury's discretion in the assessment of damages in a case predicated on subject matter such as we deal with here is wide—not wild. Theirs is the responsibility. A judge must not in-

terfere with the jury's verdict unless he conscientiously believes it excessive. *Dagnello v. Long Island R. R. Co., supra; Dellaripa v. New York, New Haven & Hartford R. Co.*, 257 F. 2d 733, 735 (2d Cir. 1958). Applying that criterion, we cannot in all good conscience say so.

Each motion addressed to the alleged excessiveness of the verdict is denied.

The jury's verdict remains undisturbed. There being no just reason for delay, let judgment be entered.

This shall be considered an order; settlement thereof is unnecessary.

So ordered:

New York, N. Y.
April 10, 1967

s/ IRVING BEN COOPER
United States District Judge

JUDGMENT

(Title Omitted in Printing)

The issues in the above entitled action having been brought on regularly for trial before the Honorable Irving Ben Cooper, United States District Judge and a jury on February 21, 23, 24, 27, 28 and March 1 and 2, 1967 and the parties to the third-party action having agreed that the issues therein be reserved to the Court, and the issues as to liability and damages having been submitted to the jury separately as stipulated to by the parties and on the issue of liability the attached interrogatories having been submitted to the jury, and the jury having answered the interrogatories as indicated thereon, and the jury on the issue of liability having found in favor of the plaintiff, and on the issue of damages the jury having awarded the plaintiff the sum of $305,000.—, and the defendant/third-party plaintiff and the third-party defendant having moved to set aside the jury verdict, as grossly excessive, and the

plaintiff having moved to amend the *ad damnum* clause from a demand of $250,000.— to $305,000.— and the Court having reserved decision on the said motions, and the Court thereafter on April 10, 1967 having handed down its Memorandum Decision denying the defendant/third-party plaintiff and the third-party defendant's motions to set aside the verdict, and granting plaintiff's motion to amend the *ad damnum* clause from a demand of $250,000.— to $305,000.—, and there being no just reason for delay of entry of this Judgment, it is

(752) ORDERED, ADJUDGED AND DECREED: That the plaintiff Carl F. Grunenthal have judgment against the defendand/third-party plaintiff The Long Island Rail Road Company in the amount of $305,000.—

Dated: New York, N. Y.
April 13, 1967

IRVING BEN COOPER
S. S. D. J.

Judgment Entered 4/13/67
John J. Olean, Jr., Clerk

OPINIONS OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

(REPORTED 388 F.2d 480)

(Title Omitted in Printing)

Before:

LUMBARD, *Chief Judge*,
MEDINA and HAYS, *Circuit Judges*.

Appeal from a judgment of the United States District Court for the Southern District of New York, Irving Ben Cooper, *Judge*.

The Long Island Rail Road Company appeals from a judgment entered on a jury verdict of $305,000 in a personal injury action under the Federal Employers' Liability Act, 45 U. S. C., Section 51. Remanded for a new trial unless plaintiff agrees to remit the amount of the recovery in excess of $200,000.

MILFORD J. MEYER, Philadelphia, Pennsylvania (Meyer, Lasch, Hankin & Poul, Philadelphia, Pennsylvania, and Irving Younger, New York, N. Y., on the brief), *for plaintiff-respondent.*

JAMES T. GALLAGHER, Jamaica, New York (George M. Onken, Jamaica, New York, on the brief), *for defendant and third party plaintiff-appellant.*

THOMAS F. COHALAN, New York, N. Y. (MacIntyre, Burke, Smith & Curry, New York, N. Y., on the brief), *for third-party defendant-respondent.*

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(481) MEDINA, *Circuit Judge*:

In this FELA action a railroad employee, Carl F. Grunenthal, the acting foreman of a group of men engaged in the removal of a partially buried timber tie on railroad premises in the Queens Village Freight Yard of the Long Island Rail Road, has recovered a verdict of $305,000, the unamended complaint hav- (482) ing sought damages in the sum of $250,000. The Railroad asserted a third-party claim against T. F. Contracting Co., Inc. that had for years furnished a boom truck and its driver for the purpose of moving railroad ties under similar conditions. The issue of liability was tried first and the jury found the negligence of the railroad caused the accident, without any contributory negligence by Grunenthal. The issues as between the railroad

and the Contracting Company were reserved for later decision by the trial judge; and the second phase of the trial before the same jury resulted in a verdict for Grunenthal as above stated. Finally, the trial judge dismissed the third-party claim. On the railroad's appeal from plaintiff's judgment entered on the verdict we find no error in the conduct of the trial but remand for a new trial unless plaintiff agrees to remit the recovery in excess of $200,000, as the verdict is so grossly excessive as to call into play our power to control excessive verdicts. *Dagnello v. Long Island R.R.*, 289 F. 2d 797 (2d Cir. 1961). We affirm the judgment dismissing the third party claim of the Railroad against the Contracting Company. This phase of the case is governed by New York law. *Ratigan v. N. Y. Central R.R.*, 291 F. 2d 548 (2d Cir.) cert. denied 368 U. S. 891 (1961). The undisputed evidence makes it clear that at all relevant times the Railroad had complete control and direction of the driver and operator of the boom truck and of the entire operation of removing the partially buried timber tie. This is enough to settle the issue as between the Railroad and the Contracting Company. *Ramsey v. N. Y. Central R.R.*, 269 N. Y. 219, 199 N. E. 65 (1935); *Irvin v. Klein*, 271 N. Y. 477, 3 N. E. 2d 601 (1936). Moreover, as held by the trial judge, there is nothing in the record to support a finding of a common law or contractual obligation on the part of the Contracting Company to indemnify the Railroad. Accordingly, we shall make no further reference to this phase of the case.

I

In the Queens Village freight yard of the Long Island Rail Road there was a 20 foot embankment below which was an area with parked cars and people moving about. On top of this embankment and a few feet from the edge of the drop there was buried in the ground a 300 pound, 9 foot 6 inch timber tie with approximately 3 feet of the tie sticking out of the ground. The tie had been there for

a long time and it had been used to fasten one end of a chain to protect the edge of the embankment.

On September 19, 1962 Grunenthal, a railroad trackman, as acting foreman had been given instructions by his superiors to remove the timber tie. The group of men under Grunenthal consisted of Michael Chindamo, a helper, and James Finley, the operator of the boom and the truck. Finley and the truck had been used for railroad work, together with railroad employees, on numerous previous occasions, pursuant to an arrangement with the Contracting Company. The three men were accustomed to work together. The customary way to remove an embedded tie was to slack the cable from the boom, fasten a pair of tongs on the projecting part of the tie, take up the slack on the cable until the teeth of the tongs became fastened on to the projecting part of the tie, then raise the tie until it was fully clear of the ground. This was step one of the customary procedure and all the witnesses agree that so far the operation proceeded without any unusual incident. The next step was to lower the cable so the tie could rest flat on the ground and give Grunenthal an opportunity to move the tongs over to the mid-section of the timber tie so that it would balance itself and facilitate the final movement of lifting the tie and placing it on the truck. Grunenthal testified that, after the timber tie was clear of the ground Finley kept lifting it higher instead of lowering it to the ground. As it went higher in disregard of Grunenthal's signal to stop, the unevenly balanced timber tie started to twist about in an eccentric manner and (483) bumped against the side of the truck. As Grunenthal was endeavoring to control the timber tie as it flailed about, the teeth of the tongs lost their grip and the timber tie fell on Grunenthal's foot. The whole operation was necessarily conducted close to the edge of the embankment and whether Grunenthal's efforts to control the tie and to prevent possible injury to those below the embankment did or did not amount to contributory negligence was clearly a question of

fact for the jury. For the same reason we must reject the Railroad's claim of contributory negligence in Grunenthal's failure to give the signal to stop by a movement of his arm at the height of his hip, according to Rule 3405 of the Railroad's Book of Rules. The jury was justified in believing Grunenthal's testimony that taking into account the relative positions of Grunenthal and Finley it was necessary to give the signal chest high to make it visible to Finley.

There was ample proof to sustain the verdict on the subject of liability without taking into account the favored position of plaintiffs in FELA cases. See *Basham v. Pennsylvania R.R.*, 372 U. S. 699 (1963); *Rogers v. Missouri Pacific R.R.*, 352 U. S. 500 (1957); *McCann v. Smith*, 370 F. 2d 323 (2d Cir. 1966).

The Railroad also seeks a reversal, however, on the basis of an incident in a recess period during the trial. This occurred after Grunenthal had given his testimony concerning the falling of the timber tie. Grunenthal, again on the witness stand, said that Finley had come up to him and his wife and told them the accident happened just exactly as Grunenthal had testified. Finley denied he made this statement but admitted he talked with the Grunenthals "about the time we worked together." Finley did not dispute Grunenthal's statement that he was the one who started the conversation. We find nothing improper in Grunenthal's conduct. The motion for a mistrial was properly denied and we approve all the other rulings by the trial judge relative to this trivial occurrence.

A further contention by the Railroad, more or less connected with the incident just described, is that as Finley was impeached by the testimony of the Grunenthals to the effect that he had made a statement contradictory to his testimony on direct examination, it was error to refuse to admit into evidence a written statement by Finley long prior to the trial to the same effect as his testimony on direct examination. There was no error in ruling out the prior consistent statement. This is a perfect example of the

common, garden variety of situation where the general rule excluding prior consistent statements should be applied. Clearly there was no abuse of discretion. Finley's motive at the time he signed the written statement, and at the time he testified on direct examination, and at the time he denied on cross-examination that he told the Grunenthals what they said he told them, was the same, namely to exonerate himself from blame for the accident. If prior consistent statements were received in evidence under these circumstances the basic facts would be buried in the confusion caused by the trial of collateral issues. See *Alexander v. Kramer Bros. Freight Lines, Inc.*, 273 F. 2d 373 (2d Cir. 1959); *Ryan v. United Parcel Service, Inc.*, 205 F. 2d 362 (2d Cir. 1953).

We have examined with care the other points made on behalf of the Railroad and find none worthy of further discussion. Contentions by the Contracting Company are passed over without comment in view of our ruling that the third party claim was properly dismissed.

II

The amount of the verdict is so grossly excessive as to affect the entire case and require a new trial unless Grunenthal agrees within a reasonable time to remit so much of the recovery as exceeds $200,000. We apply the teaching of *Dagnello v. Long Island R.R.*, 289 F. 2d 797 (2d Cir. 1961) and hold that it would be (484) a denial of justice to permit this verdict to stand.

In his enthusiasm for what he described to the jury after the verdict as their fine "spirit" and "dedication" and "with resounding emphasis in plaintiff's favor all down the line" the trial judge, we think, supplied any "absence of exaggeration" in plaintiff's testimony by doing a little exaggerating himself, as appears in the quotations cited in the dissent.

The complaint demanded a recovery of $250,000. There was no request for an amendment of the *ad damnum* clause

during the trial, no gross amounts or other indications of a possible recovery in excess of $250,000 were expressed in the summation of Grunenthal's counsel or by the trial judge in his instructions to the jury. While the cases in this Circuit indicate that an award in excess of that prayed for in plaintiff's complaint will not necessarily be set aside on that account, *Riggs, Ferris & Geer v. Lillibridge*, 316 F. 2d 60 (2d Cir. 1963); *Farmer v. Arabian American Oil Co.*, 285 F. 2d 720 (2d Cir.) cert. denied, 364 U. S. 824 (1960); *Couto v. United Fruit Co.*, 203 F. 2d 456 (2d Cir. 1953), we think, against the background of the facts of this particular case, the failure to ask for damages in such a large sum as $305,000 is not without some significance.

Grunenthal was a track worker assigned as acting foreman to the task of directing the removal of the timber tie. He was 45 at the time of the trial, with a life expectancy of 27 years. He had worked as a laborer or trackman for the Railroad during his entire mature life and was receiving, including overtime, from $5600 to $6000 a year.

His right foot was crushed by the impact of the heavy timber tie. The compound fracture involved the instep, the great toe joint and the second metatarsal. He was hospitalized on five separate occasions covering a total of 78 days between September 1962 and June 1964. There were several operations, including one of skin grafting and another "right sympathectomy." At one time there was danger that gangrene would develop. During all this period Grunenthal suffered much pain and a dull pain continued up to the time of the trial. While Grunenthal is able to walk his movement is greatly impaired as he is unable to place any weight on the inner portion of his right foot. He is not totally disabled and the testimony of his expert witness indicates he can engage in "sedentary type of work." Grunenthal said his efforts for permanent employment up to the time of the trial had been unavailing and he was then engaged in part time work as a custodian.

The instructions to the jury properly allowed a recovery for the loss of past earnings, the loss of future earnings, pain and suffering and inconvenience including "the effect of his injuries upon the normal pursuits and pleasures of life." This was Grunenthal's due. But, giving Grunenthal the benefit of every doubt, and weighing the evidence precisely in the same manner as we did in *Dagnello*, where the large sum allowed was found not to be excessive, we cannot in any rational manner consistent with the evidence arrive at a sum in excess of $200,000.

It is futile to attempt a catalogue of instances where under more or less similar circumstances the judges in this Circuit and this Court itself have directed a new trial in personal injury cases unless plaintiff agreed to remit the excess of the recovery over a sum fixed by the judge or by this Court. Each case must stand on its own particular facts.

Affirmed on the dismissal of the third party claim against the Contracting Company. On the appeal of the Railroad from the judgment entered on the verdict of $305,000, the case is remanded to the District Court for a new trial unless plaintiff agrees within thirty days from the filing of this opinion to remit such part of the recovery as exceeds $200,000. If plaintiff accepts the remittitur the judgment in his favor against the Railroad is affirmed.

* * * * *

(485) HAYS, *Circuit Judge* (dissenting in part):

I dissent from the decision to grant defendant a new trial unless plaintiff remits $105,000 of the amount awarded him by the jury.

Plaintiff's evidence as to his injury is uncontradicted. The foreparts of his right foot including the great toe joint and the second metatarsal were crushed and shattered by the 300 pound tie falling from a height of five feet. He was treated in hospitals for more than nine weeks and underwent five serious operations on the foot. He suffered great pain in his foot at all times since the accident and will continue to suffer pain unless the foot is amputated. Because

of the inadequacy of the blood supply resulting from the injury, there is constant danger of infection. Plaintiff cannot now bear weight on the foot nor will the condition of the foot improve in this respect in the future. He is severely limited in the kind of work he can do and clearly will never be able to return to his former employment.

The trial judge, who was surely in a better position to weigh the evidence than we are, referred to "the total absence of exaggeration" in plaintiff's testimony describing "the excruciating physical pain and mental anguish" he has endured since the accident. "On the record here," said the trial judge, "it [the jury] had good and sufficient reason to regard and assess [the plaintiff's pain and suffering—past and future] as excruciating, deep-seated, unrelenting and debilitating—the inducing cause of his constant misery." Of the jury's award the trial court said, "We found nothing untoward, inordinate, unreasonable or outrageous —nothing indicative of a runaway jury or one that lost its head."

While I have no doubt that we have the power to order remittitur, we should use that power sparingly indeed. We are not justified in substituting our opinion for the verdict of the jury except in the most extreme case.

> "It is well established, however, that when an appellant seeks a new trial because the verdict was excessive, the grounds for setting aside a denial of such a motion are quite narrow. If the 'action of the trial court * * * [is] not without support in the record * * * its action should not * * * [be] disturbed by the Court of Appeals' Neese v. Southern Ry. Co. [350 U. S. 77 (1955)]. And this Court has held that a new trial should not be ordered unless there has been 'an abuse of discretion' and the verdict 'is so high that it would be a denial of justice to permit it to stand.' Dagnello v. Long Is. R.R. Co., supra, 289 F. 2d at 806. Accord, Diapulse Corp. of America v. Birtcher Corp., 362 F. 2d 736 (2d Cir.) cert. dismissed, 385 U. S. 801, 87

S. Ct. 9, 17 L. Ed. 2d 9 (1966); La France v. New York, N. H. & H. R.R. Co., 292 F. 2d 649, 650 (2d Cir. 1961) (verdict will not be modified unless 'fantastic'); Wooley v. Great Atl. & Pac. Tea Co., 281 F. 2d 78, 80 (3d Cir. 1960) (verdict not to be disturbed unless 'so grossly excessive as to shock the judicial conscience' so that it would be a 'manifest abuse of discretion' not to order a new trial)." *Caskey v. Village of Wayland*, 375 F. 2d 1004, 1007 (2d Cir. 1967).

Nor is it amiss, in view of the preferred position to which jury verdicts are entitled in cases under the Federal Employers' Liability Act, to point out that in no previous case arising under that Act has our circuit ordered remittitur on the ground of excessiveness of the verdict. In *Dagnello v. Long Island R.R. Co.*, 289 F. 2d 797 (2d Cir. 1961), on which the majority seeks to rely, the court in fact refused to order remittitur and in *Hill v. Long Island R.R. Co.*, 257 F. 2d 736 (2d Cir. 1958), remittitur was ordered because of an ambiguity in the jury's verdict and not because the verdict was excessive.

(486) It is to be hoped that the disregard by the majority in this case for the integrity of the jury's verdict will not be taken by the district courts to justify a widespread increase in the use of remittitur.